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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

Nos. 74-878 and 74-879

THE NATIONAL LEAGUE OF CITIES, ET AL., *Appellants*

v.

JOHN T. DUNLOP, SECRETARY OF LABOR

THE STATE OF CALIFORNIA, *Appellant*

v.

JOHN T. DUNLOP, SECRETARY OF LABOR

On Appeals from the United States District Court for the District of Columbia

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MOTION FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE

and

BRIEF FOR SENATORS HARRISON A. WILLIAMS, JR. AND JACOB K. JAVITS AS AMICI CURIAE

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MOTION OF SENATORS HARRISON A. WILLIAMS, JR. AND JACOB K. JAVITS FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE

Senators Harrison A. Williams, Jr. and Jacob K. Javits respectfully move this Court for leave to file the accompanying brief as *amici curiae* in support of the position of Appellee, as provided for in Rule 42(3) of the Rules of this Court. The consent of counsel for Appellants in both cases

has been obtained. The Solicitor General has declined to consent on behalf of Appellee, stating that he considers it inappropriate to have presentations made by members of both the Executive and Legislative branches with respect to the meaning and constitutionality of federal legislation.

The question presented by these cases is whether the Fair Labor Standards Amendments of 1974 (Pub. Law 93-259, 88 Stat. 55, amending 29 U.S.C. 201, et seq.), are constitutional insofar as they extend the protections of the Fair Labor Standards Act of 1938 to certain employees of State and local governments. Movants Harrison A. Williams, Jr. and Jacob K. Javits are, respectively, the Chairman and Ranking Minority Member of the Senate Committee on Labor and Public Welfare (as well as its Subcommittee on Labor), which is the Committee of the Senate which drafted the challenged legislation. They were also the chief Senate sponsors and floor managers of this legislation. In addition, by virtue of their Committee positions, they have ongoing responsibilities with respect to both reviewing the implementation of the Fair Labor Standards Act and considering any future amendments of the Act.

Although the constitutional issue presented in these cases was settled by this Court's decision in *Maryland* v. *Wirtz* 392 U.S. 183 (1968), this Court has noted probable jurisdiction and has issued a stay with respect to the application of portions of the 1974 Amendments to State and local governments, on the basis of representations by Appellants which challenge both the factual and legal premises upon which Congress based the legislation and which appear to question the process by which it was developed. Accordingly, movants have a particular interest in responding to Appellants' contentions regarding the consideration given in the legislative process to the need for this legislation and its potential impact on State and local governments.

While it is unusual for members of Congress to participate as *amici curiae*, this Court has granted such motions in other cases (see e.g., *Blanchette* v. *Connecticut General*

Insurance Corp., 95 S.Ct. 335 (1974)), and it is believed that such participation is appropriate in this particular case and will be helpful to the Court.

For the above reasons, this motion to file the accompanying *amici curiae* brief should be granted.

Respectfully submitted,

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BRIEF FOR SENATORS HARRISON A. WILLIAMS, JR. AND JACOB K. JAVITS AS AMICI CURIAE

This brief is filed by Senators Harrison A. Williams, Jr. and Jacob K. Javits, contingent upon the Court's granting the foregoing motion for leave to file a brief as *amici curiae*. Their interest is set out in that motion.

ARGUMENT

The Fair Labor Standards Amendments of 1974 (Pub. Law 93-259, 88 Stat. 55, amending 29 U.S.C. 201, *et seq.*), *inter alia,* extends the protections of the Fair Labor Standards Act of 1938 to certain employees of State and local governments who were not previously covered by the 1966 Amendments to the Act (Pub. Law 89-601, 80 Stat. 830). Consideration of the 1974 Amendments involved almost four years of legislative hearings, committee action and floor debate, during which time the Act's application to State and local government employees, as well as all other issues relating to coverage, exemptions and increases in the minimum wage were thoroughly explored and reviewed.

In this brief we shall show that the constitutional question raised in these cases was settled by this Court in *Maryland* v. *Wirtz*, 392 U.S. 183 (1968)—a decision which Congress expressly relied on in adopting this legislation. In addition, we will demonstrate that contrary to Appellants' contentions, Congress fully considered the potential impact of this legislation on State and local governments, and included special provisions to meet the particular needs of those governments. Finally, we will point out why the 1974 legislation is essential if the Act is to fulfill its intended purposes in light of today's economic realities, and will show that any attempt to distinguish between different types of government employees, in the manner urged by Appellants, would be both inconsistent with the Act's purposes and totally impractical from the standpoint of fashioning workable legislation.

I.

THIS COURT'S DECISION IN MARYLAND v. WIRTZ, UPON WHICH CONGRESS RELIED IN ADOPTING THE 1974 AMENDMENTS, SETTLED THE ISSUE RAISED IN THESE CASES

In *Maryland* v. *Wirtz, supra,* this Court upheld the constitutionality of the Fair Labor Standards Amendments of 1966, which extended the Act's requirements to public hospitals and related institutions, schools and transit services. The Court pointed to the "recognized power of Congress . . . to declare that an entire class of activities affects commerce" (*id.* at 192), and noted that the Congressional determination with respect to schools and hospitals was supported by the facts of record indicating "that such institutions are major users of goods imported from other States" (*id.* at 194). In addition, since "[s]trikes and work stoppages involving employees of schools and hospitals . . . obviously interrupt and burden this flow of goods across state lines," the Court found that "a 'rational basis' exists for congressional action prescribing minimum labor standards for schools and hospitals, as for other importing enterprises" (*id.* at 195).

Thus, the Court concluded that "when a State employs people in performing [its] functions it is subject to the same restrictions as a wide range of other employers whose activities affect commerce" (*id.* at 194), and flatly rejected any notion that it should "carve up the commerce power to protect enterprises indistinguishable in their effect on commerce from private businesses simply because these enterprises happen to be run by the States for the benefit of their citizens" (*id.* at 198-99).

This decision was expressly relied upon by Congress in its consideration and adoption of that part of the 1974 Amendments which extends the Act's coverage to other public enterprises, and the legislation is well within the Court's rulings.[1] As it had in 1966 with respect to public schools, hospitals, and transit activities, Congress, in dealing with other public enterprises in 1974, exercised its "recognized . . . power . . . to declare that an entire class of activities affect commerce." As stated in the Senate Committee report:

> "there is no doubt that the activities of public sector employers affect interstate commerce and therefore that the Congress may regulate them pursuant to its power to regulate interstate commerce. Without ques-

[1] See H.Rep. No. 93-913, 93d Cong., 2d Sess., pp. 6-7; H.Rep. No. 93-232, 93d Cong. 1st Sess., p. 6; S.Rep. No. 92-842, 92d Cong., 2d Sess., pp. 18-19; Statements of Senator Javits, 118 Cong. Rec. S24240, July 18, 1972 (daily ed.), and Senator Williams, 118 Cong. Rec. S24949, July 20, 1972 (daily ed.).

As the Court noted with respect to the 1966 Amendments, the 1974 legislation also "specifically exempts any 'employee employed in a bona fide executive, administrative, or professonial capacity' " (392 U.S. at 193). In addition, it excludes elected officials of state or local government, as well as individuals not subject to the civil service laws of their jurisdiction, or who are selected or appointed by elected officials to be members of their personal staffs or to serve on a policy making level or to act as immediate advisers with respect to the constitutional or legal powers of an elected official's office (29 U.S.C. 203(e)(2)(c)). With these exemptions and exclusions the 1974 amendments extend the Act's protections to 3.4 million state and local government employees (as compared to the 2.9 million covered by the 1966 Amendments).

> tion, the activities of government at all levels affect commerce. Governments purchase goods and services on the open market, they collect taxes and spend money for a variety of purposes. In addition, the salaries they pay their employees have an impact both on local economies and on the economy of the nation as a whole. The Committee finds that the volume of wages paid to government employees and the activities and magnitude of all levels of government have an effect on commerce as well." [S. Rep. No. 93-690, 93d Cong., 2d Sess., p. 24.]

See also statements of Senator Williams, which discussed and included a Bureau of Labor Statistics study—*Manpower Impact of Purchases by State and Local Governments*—showing that purchases made by State and local governments in 1971 totalled $135 billion. 119 Cong. Rec. S14056-60, July 19, 1973 (daily ed.).

In view of the nature of our economy it cannot be doubted that a substantial portion of such purchases (as well as the funds used to pay for them)—representing some 13% of the gross national product—must necessarily move in interstate commerce. This conclusion appears not to be disputed in this case since, as the court below pointed out, "it is uncontested that the state and municipal institutions whose employees are reached for the first time by the 1974 Amendments do make substantial purchases in interstate commerce of equipment and other goods" (App. 649).

Given this substantial relationship of state and local government activities to interstate commerce, the same constitutional basis clearly exists for the 1974 Amendments as this Court found in the case of the 1966 Amendments. Accordingly, this Court could strike down the 1974 Amendments only by disavowing its prior rulings upholding legislation which has governed the minimum wage and overtime compensation paid to some 2.9 million public school, hospital and transit employees since 1967. We note that this Court has itself very recently had occasion to point out the inappropriateness of calling into question the constitutional premises of prior decisions where "a great deal of public and private business has been transacted" and where there

has been "major legislation enacted by Congress" in reliance thereon. *United States* v. *Maine,* No. 35 Orig., March 17, 1975, 43 L.W. 4359, 4363.

II.

CONGRESS REASONABLY CONCLUDED THAT EXTENSION OF FAIR LABOR STANDARDS ACT COVERAGE WOULD NOT IMPOSE AN UNDUE BURDEN ON STATE AND LOCAL GOVERNMENTS

A. Congressional Actions Was Based on Well-Documented Studies of Past Experience and Projected Impact, and Took Particular Account of the Special Needs of Police and Fire Departments

Appellants in No. 74-878, in predicting the most dire consequences from the Act's application, contend that "Congress made no credible study of the cost impact of these Amendments to State and local government", and "seemingly acted largely upon the false representations of no impact" (brief, pp. 89, 122-23).

While these are "matters outside judicial cognizance" since a rational basis clearly exists for the legislation (see *Maryland* v. *Wirtz,* 393 U.S. at 194, n. 22), we believe it nevertheless appropriate to demonstrate the inaccuracy of such accusations, in view of the nature of Appellants' attack upon the Congressional action.

At the outset it should be noted, as the Senate Committee report stated, that "[e]ach time Congress has considered minimum wage increases and expansions of coverage under the law, opponents to such action have raised the specter of economic doom," but economic studies prepared after each such action have shown "that the prophecies have proven false" (S.Rep. No. 93-690, 93d Cong., 2d Sess. pp. 9-10; see also statement of Senator Javits, 119 Cong. Rec. S13734, July 17, 1973, daily ed.)

These exercises in specter-raising have particularly characterized the coverage of State and local government employment. For example, in their brief to this Court in *Maryland* v. *Wirtz,* the plaintiff States, who were there challenging the Act's extension to public schools and hospitals, asserted that "[n]ever before in the history of this

nation has the federal government presumed to enact a law which both in theory and in practice, serves as the basis for the utter destruction of the State as a sovereign political entity" (brief for appellants, No. 742, Oct. Term 1967, pp. 9-10). The actual experience in no sense has borne out this grim prophecy.

In 1970 the Department of Labor submitted to Congress detailed studies on the economic effects of the 1966 coverage of schools and hospitals.[2] As pointed out in the Senate Committee report, the conclusion expressed by the Secretary in submitting such studies was that:

> "Overall it can be stated that the educational and hospital sectors have had little evident difficulty adjusting to the minimum wages established by the 1966 Amendments." [S. Rep. No. 92-842, *supra*, p. 19.]

It is significant that although the National League of Cities testified before the Senate Labor Subcommittee in 1971 and the House General Labor Subcommittee in 1973 on this proposed legislation, it made no attempt whatever to refute this conclusion or the data upon which it was based.[3]

Consideration by Congress of extending the Act's coverage to other public enterprises was also preceded by a

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[2] *Economics Effects Studies: Hospitals*, U.S. Dept. of Labor, Wage and Labor Standards Administration, Submitted to the Congress, 1970; *Economic Effects Studies; Educational Institutions*, U.S. Dept. of Labor, Wage and Labor Standards Administration, Submitted to the Congress, 1970.

[3] See Hearings before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, on S. 1861 and S. 2259, 92d Cong., 1st Sess., pp. 1698-1711; and Hearings before the General Subcommittee on Labor of the House Committee on Education and Labor, on H.R. 4547 and H.R. 2831, 93d Cong., 1st Sess., pp. 148-158.

Other than the testimony of the National League of Cities, and a number of letters received from individual cities mainly concerned with firemen's schedules (see *infra*, p. 10, n.6), no testimony was offered by any State or local government, or association of such governments, during the lengthy hearings held by both the Senate and House on the bills which led to this legislation.

Labor Department study evaluating the feasibility of such an extension. *Nonsupervisory Employees in State and Local Governments*, U.S. Department of Labor, 1971 Report to Congress. One of the findings of this feasibility study was that the impact of extending the Act to other public enterprises would be even less than it had been on schools and hospitals. Thus, as set forth in the Congressional committee reports, the study concluded:

> "The nationwide survey of State and local governments (excluding educational and hospital institutions) indicates that wage levels for State and local government employees not covered by the FLSA are, on the average, substantially higher than those of workers already covered. Hence, if coverage under the FLSA is extended to those workers, comparable minimum wage and overtime standards would not have as great an impact as did the earlier extension of FLSA coverage to employees of State and local government schools, hospitals and residential care establishments." [S. Rep. No. 92-842, *supra*, p. 19; H. Rep. No. 93-913, *supra*, p. 28.]

In its feasibility study the Labor Department had considered the application of the Act's overtime requirements to State and local governments, and had pointed out that "[l]ong work weeks were most prevalent among employees in the public safety activity, which includes police and fire departments", with "[a] fifth of the public safety employees work[ing] over 40 hours" (see H. Rep. 93-913, *supra*, p. 29). In evaluating the overall impact of the overtime provisions, however, the study concluded:

> During the survey week, only 2.3 percent of total nonsupervisory man-hours in State and local governments represented hours worked in excess of 40. If a 40-hour Federal overtime standard were in effect at the time of the survey, the premium pay required for these hours would have approximated one percent of the weekly wage bill. The actual impact of a 40-hour standard would have been less because a substantial proportion of the employees receive premium overtime pay.[4] [H. Rep. No. 93-913, *supra*, p. 29.]

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[4] This last sentence had reference to the fact that the study had shown that "well over two-fifths of the nonsupervisory workforce"

With respect to the prospective impact of a minimum wage requirement, the Labor Department provided Congress in 1973 with updated figures showing that 389,000 state and local government employees were paid less than $1.80 per hour, including 75,000 of those who would be newly covered by the proposed amendments (the latter figure being raised to 95,000 when the proposed minimum wage was increased $1.90 per hour). The total first-year cost of increasing all covered state and local government employees—both those previously covered and those proposed to be covered—to $1.80 per hour was calculated at $128 million, representing an increase of only 0.3% of the total annual wage bill for such governments. See *Background Material on the Fair Labor Standards Act Amendments of 1973,* 93d Cong., 1st Sess., p. 220; S.Rep. No. 93-690, *supra,* p. 24; H. Rep. No. 93-913, *supra,* p. 28.

It is thus clear that Congress was well informed concerning the potential effects of the 1974 Amendments, and, contrary to Appellants' contention, Congress did not act on the assumption that there would be no impact on State and local governments.[5] It is also noteworthy that

of State and local governments were already covered by premium pay provisions for overtime work (see *Nonsupervisory Employees in State and Local Governments, supra,* p. A-46, Table 44).

[5] Appellants' charge that Congress "seemingly acted largely upon the false representations of no impact" (NLC brief, p. 89) apparently has reference to a statement in a House Committee report that "[t]he actual impact on State and local governments . . . of a 40 hour standard will be virtually non-existent" (H.Rep. No. 93-913, 93d Cong., 2d Sess., p. 29). It should be noted that this statement was made at a time when the House bill excluded police and firemen from any overtime pay requirement. The Report noted that a tenth of nonsupervisory employees in State and local government worked over 40 hours during the Labor Department's survey week, but cited the Labor Department's conclusion that a 40-hour overtime standard would cost State and local governments substantially less than 1% of payroll, in view of the substantial number of such employees already receiving premium overtime pay. Pointing out that overtime hours were most prevalent among employees in police and fire departments, the House report quite naturally concluded that in view of their proposed exemption, there would be no significant impact from a 40-hour standard applied to other State and local government employees

the testimony presented by the National League of Cities during the 1971 and 1973 hearings did not significantly contradict the Labor-Department data discussed above.

Although the League did oppose further extension of the Act's coverage to municipal governments on policy and constitutional grounds, and questioned the ability of many municipal governments to absorb or pass on any increased costs, it advised the Congressional committees, on the basis of its own survey, that the impact of the minimum wage requirement would be insubstantial and that the chief concern was with overtime pay for the firemen and policemen. Thus, with regard to the minimum wage, the League advised that of the total work force in the 141 cities that had responded to its survey, "22.2% are below the minimum wage," but that the dollar impact was regarded as "not substantial," the responses from the 141 cities indicating that "the additional cost would be $4.6 million at $2.00 an hour and $20.2 million at $2.25 an hour." With respect to overtime the League stated that its assessment of the potential dollar impact of the Act's coverage "is largely due to police and fire shifts," pointing out that "typically, firemen work 56 hours a week, as many as 24 hours a shift." It was for this reason that "the overtime provisions are of greater concern than the minimum wage," and that the "overriding concern is for firemen, and to a lesser extent, policemen." Hearings Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare on S.1861 and S.2259, 92d Cong., 1st Sess, pp. 1705-06, and Hearings Before the General Subcommittee on Labor of the House Committee on Education and Labor, on H.R. 4547 and H.R. 2831, 93d Cong., 1st Sess. pp. 153-54.[6]

[6] The League's concern over a proposed overtime standard for firemen who work 56 hours a week was restated in a February 1973 letter to Senator Williams which appears in Hearings before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, on S. 1861 and S. 1725, 93d Cong., 1st Sess., 160a. Those same Hearings (pp. 225a-269a) also include letters from some individual cities stating that their objections to the proposed legislation were directed at this same problem.

In view of the National League of Cities' repeated statements to Congress that its chief concern was over the application of the 40-hour a week standard to firemen who typically work 24-hour shifts and 56-hour weeks, it is of particular significance that the measure which emerged from the final Senate-House conference was tailored with particular care to meet this very concern. This included the adoption of an entirely new provision—Section 7(k) of the amended Act (29 U.S.C. 207(k))—which, in the case of fire protection and law enforcement personnel, permits a substantial departure from the Act's traditional overtime requirements.

As explained in the Conference Report (S. Rep. 93-758, 93d Cong., 2d Sess., pp. 4-8), this provision is based on a "tour of duty" concept which Congress recognized as more appropriate to the actual working schedules of such personnel than the Act's customary "hours of work" concept. Moreover, it permits overtime to be calculated on the basis of a work cycle of up to 28 days—rather than the Act's customary workweek standard—thus permitting the avoidance of overtime payments through the averaging hours of hours and the granting of compensatory time off within this extended period. In addition, in order to provide ample opportunity to make any necessary adjustments, the overtime standard is applied at a phased-in rate, based upon 240 hours over 28 days—i.e., an average of 60 hours a week—beginning January 1, 1975. The ultimate standard, which will not be reached until January 1, 1978, is based on 216 hours over 28 days—i.e., an average of 54 hours a week—or such lesser number of hours during a 28-day period as the Secretary of Labor's survey shows to be the average tours of duty established by public agencies for fire protection and law enforcement personnel.[7]

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[7] It is clear that Appellants' impact claims take little note of this provision. As pointed out in the Supplementary Affidavit of Jack I. Karlin, Appellants' cost projections are "based upon the assumption that a substantial percentage of the cities whose tours of duty for firefighters do not exceed the maximum hours permitted without premium pay (an average of 60 hours a week) will mistakenly fail to elect the provisions of the . . . Act which will permit them to avoid all overtime pay" (App. 640.)

In short, Congress extended the Act's requirements to those public enterprises not previously covered only after receiving and considering well-documented studies—whose results were never disputed during the consideration of the Amendments although they were the subject of more than three years of hearings—which indicated that the impact would be small in terms of total payroll. In addition, Congress was careful to further soften the impact in the one area—overtime for fire protection and law enforcement personnel—which the representatives of local government had identified as presenting special problems.

B. Through the Appropriation of Federal Funds for Assisting State and Local Governments Congress Was Well Aware of Both Their Budgetary Needs and Their Ability To Meet the Act's Additional Costs

In assessing the ability of State and local governments to meet any cost increases resulting from the Act's coverage, Congress took account of the very substantial amounts of Federal funds contributed to such governments through a variety of revenue sharing and grant-in-aid programs (see, e.g., discussion by Senator Williams during 1972 floor debates (118 Cong. Rec. S24749, July 20, 1972, daily ed.).

The fact is that Federal assistance represents a highly significant and growing portion of the budgets available to State and local governments. According to data summarized in *Trends in Fiscal Federalism, 1954-1974,* Advisory Commission on Intergovernmental Relations, 1975, pp. 2, 21, 27, Federal funds "accounted for 11.4 per cent of state-local general revenue in 1954 [and] expanded to 26.5 per cent of state-local general revenue in 1974." The total of such assistance in Fiscal Year 1974 was $46 billion, and increases are projected to $52.6 billion in Fiscal Year 1975 and $55.6 billion in Fiscal Year 1976 (see Executive

Office of the President, *Special Analyses, Budget of the United States Government, Fiscal Year 1976,* p. 249.

A breakdown of such Federal assistance, appearing at pp. 246-251 of the foregoing publication, shows that such Federal funds flow to a myriad of government activities, including education, law enforcement and correction facilities, highways, water supply, sewerage and sanitation, transit, public welfare, employment security administration, housing and urban development, natural resources, parks and recreation, and libraries—categories which employ well over 90% of State and local government workers.[8]

The fact that Congress authorizes and appropriates the funds for such assistance demonstrates both its concern for the budgetary problems of State and local governments and its awareness of the ability of such governments to meet the increased expenditures which the Act's coverage might entail. This massive amount of Federal assistance also refutes the suggestion repeated throughout Appellants' brief that enactment of the 1974 Amendments deprives State and local jurisdictions of "ballot box control" of their budgets and decisions "on the extent and nature of State and City Government services" (see brief in No. 74-878, p. 113).

In view of the degree of dependence such jurisdictions have upon Federal funds, the notion that but for the Fair Labor Standards Act State and local governments would have absolute dominion over their own budgets and the level of public services they will provide is totally unrealistic. The fact is that whether this Act applies or not, an increasingly significant determinant of the level of State and local governmental activity has been, and will continue to be, the contribution of funds from the Federal government. The situation has been quite accurately summed up by the Advisory Commission on Intergovernmental Relations in its statement that "[t]here has been a sharpening

[8] See *Public Employment in 1973,* U. S. Department of Commerce, Bureau of the Census, pp. 3, 9, 10 for numbers and percentages of State and local government employees in each category of activity.

of roles as the Federal government has become the dominant fiscal partner while the 'work' of government is carried on primarily at the state-local levels" (*Trends in Fiscal Federalism, 1954-1974, supra,* p. 2).

III.

EXTENSION OF THE ACT TO PUBLIC EMPLOYEES IS NECESSARY TO EFFECTUATE THE ACT'S TRADITIONAL OBJECTIVES IN LIGHT OF PRESENT DAY CIRCUMSTANCES

A particularly significant development has been the ongoing—indeed, relentless—movement of employment from private industry to the State and local government sector. As shown by recent Commerce Department data, employment by State and local governments, computed on the basis of full-time equivalent employees, increased from 9.2% of private industry employment in 1955 to 12.7% in 1965, and 14.8% in 1973—an increase from 4.1 million in 1955 to 9.1 million in 1973.[9] As one report to Congress has pointed out, a major factor in this increase "is the proliferation of Federal grant programs resulting from Federal legislation concerning welfare and medical assistance, urban renewal, primary and secondary education, water and air pollution, highway construction, and regional development." *Nonsupervisory Employees in State and Local Government, supra,* p. 42.

This changing character of our national employment patterns underscores the need to cover State and local government employees if the Fair Labor Standards Act is to accomplish its traditional objectives. Indeed, as we show below, fulfillment of those objectives could otherwise be thwarted as the Act becomes applicable to a constantly decreasing portion of the total workforce.

[9] *Trends in Fiscal Federalism,* 1954-1974, *supra,* p. 31. See also data contained in *Manpower Impact of Purchases by State and Local Governments, supra,* appearing in 119 Cong. Rec. S14057, July 19, 1973 (daily ed.), and *Public Employment in 1973,* U. S. Dept. of Commerce, Bureau of Census (1974).

A. Coverage of the Growing Workforce Employed by State and Local Governments Is Warranted by the Act's Objective of Eliminating Substandard Labor Conditions Which Might Otherwise Lead to Disputes Disruptive of Interstate Commerce

As pointed out by this Court in *Maryland* v. *Wirtz,* one of the objectives of the original Act was "to promote labor peace by regulation of . . . wages and hours, out of which disputes frequently arise" (392 U.S. at 191). This same objective was no less present in extending the Act's coverage to employees of State and local governments. The Congressional concern on this score was summarized in Senator Javits' statement during the 1974 floor debates:

> ". . . [W]e are very resentful, very unhappy, when workers in the public domain threaten to strike. This is inevitably the result of the deep feeling that economic justice cannot otherwise be obtained, and I respectfully submit that we will go a lot further in getting tranquility in the labor field by giving them a minimum wage status and an overtime status than in almost any other way I can think of, and prevent the feeling on their part that the only way one can get justice is by rule of the jungle, to wit, by strikes and ceasing essential public services." [120 Cong. Rec. S 2518, February 28, 1974, daily ed.]

Although Appellants claim that the legislative history of the 1974 Amendments contains no express finding that labor disputes involving public employees have an effect on interstate commerce (NLC brief, pp. 22-23), this Court has made clear that no such finding is needed. See *Maryland* v. *Wirtz,* 392 U.S. at 190, n. 13. There is certainly no reason to question the continuing validity of the original Act's finding, reaffirmed in *Maryland* v. *Wirtz,* 392 U.S. at 191, 194-5, that the existence of substandard labor conditions "leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce."

In *Maryland* v. *Wirtz,* this Court readily recognized that "[s]trikes and work stoppages involving employees of schools and hospitals, events which unfortunately are not infrequent, obviously interrupt and burden this flow of goods

across state lines" (392 U.S. at 195). Significantly, the Labor Department release cited by the Court as evidencing the magnitude of the work stoppage problem (see 392 U.S. at 192, n. 25) showed that in 1966 there were 142 work stoppages by employees of state and local government, resulting in a total of 454,840 man-days of work lost. By comparison, for 1972 the same Labor Department source tabulated a total of 375 state and local government work stoppages with 1,257,000 man-days lost, and the data being published for 1973 shows an increase to 386 work stoppages with 2,299,300 man-days lost. *Work Stoppages in Government, 1972,* Report 434, U.S. Department of Labor, Bureau of Labor Statistics, p. 3.[10]

It is obvious, moreover, that work stoppages by government employees disrupt not only the commerce-related activities engaged in by their own agencies, but also the activities in commerce of those private enterprises which are dependent upon a variety of such government services as utilities, police and fire protection, bridge and tunnel operation, sewage and sanitation, road construction and maintenance, and transit services. In addition, the role that State and local government activities now play in the Nation's economy as a whole, including inevitably the level of engagement in interstate commerce, is so significant that interruptions of the normal activities of such government

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[10] Since 1966 the data on total work stoppages at the State and local government level shows as follows:

Year	Number of Stoppages	Man-days Idle
1966	142	455,000
1967	181	1,246,300
1968	251	2,535,600
1969	409	744,600
1970	409	1,375,100
1971	327	893,400
1972	375	1,257,200
1973	386	2,299,300

agencies are bound to have widespread repercussions upon interstate commerce.[11]

Thus, the plain facts are that both the size of the workforce employed by State and local governments and the problems of labor unrest among that workforce have increased markedly in recent years; at the same time the activities of State and local governments and their impact upon the Nation's economy have been expanding. It quite simply was no longer realistic for Congress to ignore this prominent sector of employment in establishing minimum wage and hour standards for American workers, if those standards are to serve their intended purpose.

B. The Act's Further Objective of Benefiting the National Economy by Increasing the Purchasing Power of Low-Paid Workers and Encouraging the Spreading of Available Employment Opportunities Has Equal Application to Both Private and Governmental Employment

In finding, in the original Act, that the existence of substandard labor conditions "burdens commerce and the

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[11] One aspect of this role is documented by a study—*Manpower Impact of Purchases by State and Local Governments, supra*—which was introduced and considered during the Senate debates on the 1974 Amendments. As stated in this study:

> "State and local government purchases have grown substantially in the past decade, and in 1971 accounted for 13 per cent of the Gross National Product in current dollar terms .... As a result of this increased rate of spending, State and local governments were a major factor in the generation of jobs during the past decade. In the 1959-71 period, employment generated by State and local government purchases of goods and services accounted for nearly 35 per cent of the increase in jobs, with more than three-quarters of these directly on State and local government payrolls and the remainder primarily in the private sector. In 1971, State and local governments, directly or indirectly, accounted for approximately 16 per cent of the country's total civilian employment. This means that, on the average, each $1 billion of State and local government purchases that year generated almost 100,000 jobs. With the continued channeling of large amounts of Federal funds to States and localities, the spending of State and local governments will continue to create significant demand on the national job market." [119 Cong. Rec. S14056, July 19, 1973, (daily ed.).]

free flow of goods in commerce," Congress gave expression to another important objective. This was to improve the health of the economy as a whole—and thereby unburden commerce and the free flow of goods—by increasing the purchasing power of lower paid workers through use of the minimum wage and by spreading available work through imposition of a premium on overtime hours. As stated in the House Committee report on the 1938 enactment:

> "America does not suffer from a scarcity of goods or a scarcity of labor, but from a scarcity of purchasing power .... The American farm and the American factory could supply much more adequately and abundantly the needs of our people if our people had the wherewithal to buy what the farm and factory can produce .... A fair day's pay for a fair day's work will increase the purchasing power of American workers. It will enable them to buy more products from farm and factory. It will give increased employment in industry and on the farm to those now unemployed. (H. Rep. 1452, 75th Cong., 1st Sess., pp. 8-9.)

Similarly, this Court has repeatedly pointed out that "[i]n a period of widespread unemployment . . . the economy inherent in avoiding extra pay was expected to have an appreciable effect on the distribution of available work," and accordingly, that ["r]eduction of hours was a part of the plan from the beginning." *Overnight Motor Transportation Co.* v. *Missel,* 316 U.S. 572, 578 (1942); see also *Walling* v. *Helmerich & Payne,* 323 U.S. 37, 40 (1944); *Southland Gasoline Co.* v. *Bayley,* 319 U.S. 44, 48 (1943).

These purposes similarly motivated the 1974 Amendments and their extensions of coverage. As stated in one of the Senate Committee reports:

> "[By the] establishment of a minimum wage rate . . . [for] workers who do not currently enjoy such protection, and eliminating overtime exemptions where they have been shown to be unnecessary, the economy will be stimulated through the injection of additional consumer spending and the creation of a substantial number of additional jobs." [S. Rep. No. 93-690, 93d Cong., 2d Sess., p. 9.]

It was recognized, moreover, not only that a higher minimum wage "means increased purchasing power in the hands of the poor and a greater demand for goods and services", but also that "[f]or the Government it means lower welfare costs" (S. Rep. No. 92,842, *supra,* p. 8).

From the point of view of stimulating the economy, there is clearly no distinction to be made between application of the Act to private employment and to government employment. The effect upon the economy of increasing the purchasing power of low paid workers and encouraging the spreading of available employment opportunities is the same in either case. And, since, as we have already emphasized, employment by State and local governments has become an increasingly significant factor, achievement of this Congressional objective could well be frustrated if such employment were not covered.

It may be added that where a Congressional enactment based on the commerce power is directed, as here, at the overall health of the national economy—a matter inseparable from interstate commerce—then all activities which significantly affect that objective necessarily have sufficient relationship to commerce to be within the ambit of that power. This appears to be the teaching of this Court's decision in *Wickard* v. *Filburn,* 317 U.S. 111, 125 (1942), where it was held that insofar as an earlier Congressional enactment was designed to restore the health of the wheat industry, it could reach any activity, "whatever its nature . . . if it exerts a substantial economic effect" on commerce in that commodity.

This Court has also pointed out that "Commerce itself is an intensely practical matter . . . To deal with it effectively Congress must be able to act in terms of economic and financial realities." *North American Co.* v. *Securities and Exchange Comm.,* 327 U.S. 686, 705 (1946). It was on the basis of just such realities that Congress acted in the present instance to reach activities which have a substantial effect upon the entire economy—and hence, the commerce of the Nation.

C. To Attempt To Distinguish Between Activities Which Are "Governmental" and Those Which Are Similar to Activities in Private Enterprise Would Not Only Undercut the Act's Objectives but Would Be Totally Impractical in Application

California argues that the Act should not apply to activities which are "unique" to government, or which have no counterparts or competitors in the private sector (brief, pp. 47, 49). While the Solicitor General will undoubtedly discuss the reasons why such distinctions have no constitutional significance in view of this Court's prior rulings, we wish to stress that any effort to exclude significant portions of public sector employment from the Act's coverage would frustrate the objectives we have previously discussed. Moreover, it is appropriate to point out the utter impracticability of any such distinctions from the point of view of drafting or applying legislation. The simple fact is that the distinctions which California suggests exist, if at all, only in the most theoretical sense; in practical effect, they do not.

A review of the types of activities in which employees of State and local governments are engaged—education, hospitals, health services, utilities, transit operations, highway construction and maintenance, water transportation and terminals, libraries, airport operation, recreation facilities, state liquor stores[12]—readily demonstrates that scarcely any are "unique" to government, but in varying degrees have counterparts in the private sector. See *Indian Towing Company* v. *United States,* 350 U.S. 61, 68 (1955). Even police and fire protection services—which are obviously the main focus of Appellants' concern in this case—have counterparts in private fire prevention and control as well as private guard, detective, security patrol and other protective services.

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[12] See *Public Employment in 1973,* U. S. Department of Commerce, Bureau of the Census, p. 9, Table 3.

Moreover, the actual occupations in which government employees work can almost all be readily identified in private employment.[13]

In such a context we believe it would be absolutely futile to attempt to draft legislation which can distinguish between activities or occupations, on the broad basis suggested by California. Of course, as already pointed out (p. 3, n.1, *supra*), the 1974 Amendments did exclude not only executive, administrative and professional employees generally, but also elected and other policymaking officials. Beyond this, we agree with this Court's conclusion in *Indian Towing Company, supra,* that the "'non-governmental—governmental' quagmire" involves "distinctions so finespun and capricious as to be almost incapable of being held in the mind for adequate formulation,"[14] and that any attempt to invoke such distinctions would result in "the inevitable chaos when courts try to apply a rule of law that is inherently unsound" (350 U.S. at 65, 68).

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[13] The point is well illustrated by the State and local government job listings which the Department of Labor's survey found to have entry pay levels below the minimum wage in 1969-70. See *Nonsupervisory Employees in State and Local Government, supra,* pp. 52-57. For example, the complete listing of sub-minimum wage jobs in the Arkansas State government is as follows: "Clerk, cook, custodial worker, dairyman, deckhand, elevator operator, farmworker, fish culturist, food service worker, forest towerman, foster grandparents, groundskeeper, highway bridge tender, housekeeper, keypunch operator trainee, laborer, laboratory aide, linen room worker, messenger, medical assistant, mental retardation aide, museum guide, public health clinic aide, revenue permit agent, seamstress, skill trades helper, social service aide, stock clerk, switchboard operator, trapper, watchman."

[14] The fact that such distinctions are indeed "incapable of being held in the mind" is confirmed by California's attempt to illustrate the types of jobs it regards as "governmental." It is evident that many of the cited activities, including "historian specialists," "fire prevention officers," "highway equipment mechanics," "water use analysts," "airport environmentalists," and "property appraisers" are types of functions which are also performed in the private sector. See Calif. brief, p. 47, n.24.

CONCLUSION

For the reasons stated herein the decision of the Court below should be affirmed.

Respectfully submitted,

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